

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MICHAEL D. BUTTON	:	ORDER
AND JAMES F. BUTTON	:	DTA NO. 817034
	:	
for Revision of a Determination or for Refund of	:	
Sales and Use Taxes under Articles 28 and 29 of the	:	
Tax Law for the Period October 7, 1997 through	:	
November 8, 1997.	:	

Petitioners, Michael D. Button and James F. Button, 2 Button Lane, Frankfort, New York 13340, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period October 7, 1997 through November 8, 1997.

Petitioners, by their representative, Thomas G. Jackson, Esq., filed a motion on September 10, 1999 for an order precluding the Division of Taxation from giving evidence at hearing of items of which particulars were demanded and not delivered or, in the alternative, directing the Division of Taxation to furnish a further bill. The Division of Taxation, by its representative Terrence M. Boyle, Esq. (John E. Matthews, Esq., of counsel) filed a reply to the motion on September 20, 1999, which date began the 90-day period for the issuance of this order. Based on the pleadings, motion papers, briefs and other documents filed by the parties, Jean Corigliano, Administrative Law Judge, renders the following order.

FINDINGS OF FACT

1. Petitioners commenced a proceeding in the Division of Tax Appeals by filing a petition on April 1, 1999 protesting notices of determination of sales and use taxes due which had been

issued to petitioners by the Division of Taxation (“Division”). These notices assessed tax in the amount of \$427,560.00 for the period October 7, 1997 through November 8, 1997 plus penalty and interest. Attached to the petition were conciliation orders, dated March 5, 1999, which indicated that as a result of a conciliation conference in the Bureau of Conciliation and Mediation Services the tax assessed against petitioners had been sustained, but all penalties had been canceled.

2. In Part 6 of the petition, petitioners alleged that three errors were made by the Division.

(1) Petitioners claimed that the Division erred in its determination that they were persons responsible for payment of pre-paid sales and use taxes on behalf of Herkimer Wholesale Co., Inc. (“Herkimer”), a cigarette wholesaler and distributor, during the assessment period. Petitioners maintained that the actions of Herkimer’s secured creditor, Marine Midland Bank, Inc., deprived them of authority and control of Herkimer’s assets.

(2) Petitioners claimed that the Division erroneously authorized Marine Midland Bank to sell cigarette inventory which it had repossessed from Herkimer without requiring Marine Midland Bank to remit payment for the stamps affixed to the cigarette packs. Petitioners argue that inasmuch as Herkimer had purchased the stamps under a 30-day credit agreement with the Division, the Division was obliged to impose liability for the prepaid sales tax on Marine Midland and to reduce the amount of sales and use tax owed by Herkimer accordingly.

(3) Petitioners alleged that the Division authorized Marine Midland Bank to return unaffixed tax stamps for refund instead of applying the value of the unaffixed stamps against the tax owed by Herkimer.

3. In its answer to the petition, the Division denied the three allegations summarized above and made an affirmative statement in response to each allegation. In response to

petitioners' contention that they were not liable for the prepaid sales tax on cigarettes because the actions of Marine Midland deprived them of authority and control of the corporation, the Division stated: "The liability for the stamps arose at the time that the corporation took possession of the stamps."

In response to petitioners' contention that the Division erroneously authorized Marine Midland to sell Herkimer's cigarette inventory, the Division stated: "Any offset that results from stamps being transferred by the secured creditor (these were affixed to cigarette packages or other tobacco product, thus could not be returned to the Division) to another cigarette agent is a dispute between the corporation and the secured creditor."

In response to petitioners' contention that the Division erroneously refunded tax to Marine Midland for unaffixed stamps, the Division stated: "All unaffixed stamps that were returned to the Division were more than two years old, thus any credit or refund was time-barred." It also stated: "No refund or credit was allowed for the unaffixed stamps that were returned to the Division, as they were more than two years old."

4. Petitioners explained the basis for their positions in a Statement of Facts consisting of 21 separately numbered paragraphs. In its answer, the Division admitted the facts stated in paragraphs 1 through 5 of the petition. Finding of Facts "4" through "9" of this determination include facts taken from those paragraphs.

5. Michael D. Button and James F. Button ("petitioners") are brothers and former principals of Herkimer. Herkimer was a wholesale distributor of cigarettes, candy and other items. It was located in Utica, New York.

6. Herkimer held a license from the Division to act as a cigarette agent for New York State.

7. As a licensed tax agent possessing cigarettes within New York, Herkimer was liable for the collection and payment of the cigarette tax and the prepaid sales tax on cigarettes, and it was required to pay the tax by purchasing stamps and to evidence the payment of tax by affixing stamps to cigarettes in its inventory.

8. Herkimer filed a credit bond with the Division in the amount of \$2,200,000.00 and was permitted to purchase cigarette tax stamps on credit and to pay for them 30 days later rather than on a cash basis. The credit bond bound National Union Fire Insurance Company of Pittsburgh, Pennsylvania, as surety, for any default on the part of Herkimer in the payment of the cigarette or prepaid sales tax.

9. Herkimer also filed with the Division an authorization for the Division, or its agent bank, to debit Herkimer's account at Marine Midland Bank for the amount of tax stamps purchased. Under this arrangement, Herkimer purchased cigarette tax stamps from the Division by telephone, and Herkimer's account with Marine Midland was debited for the amount purchased 30 days later.

10. The following is a summary of facts stated in the petition in paragraphs "6" through "14". In its answer, the Division stated that it lacked information or knowledge which would allow it to admit or deny these facts.

(a) Since 1968, Herkimer had various banking relationships with Marine Midland, including checking accounts, demand loans, installment loans and mortgages. In September 1996, Herkimer began experiencing liquidity problems when Marine Midland changed its borrowing formula and refused to allow Herkimer to borrow against such items as cigarette coupons and cigarette coupon receivables, manufacturer receivables and the values of affixed and unaffixed cigarette stamps. Apparently, Herkimer became past due on one or more loans

from Marine Midland, and in November 1997 it was informed that all of the corporation's deposits had been applied to outstanding loan balances and that all checks and debits presented against Herkimer's operating account, including the debits for the cigarette stamps, were being dishonored.

(b) Several bankruptcy proceedings followed the action of Marine Midland beginning with the filing of an involuntary bankruptcy petition filed against Herkimer on November 10, 1997. On February 24, 1998, Marine Midland seized all of Herkimer's assets, including stamped and unstamped cigarettes and unaffixed tax stamps.

11. The following facts are taken from paragraphs "16" and "17" of the petition. In its answer, the Division admitted these facts.

(a) On or about March 3, 1998, in response to a request made by Marine Midland, the Division authorized Marine Midland to act temporarily as a tax agent of the State and a wholesale dealer to sell stamped and unstamped cigarettes seized from Herkimer and to return unused stamps for a refund.

(b) The Division specifically authorized Marine Midland to sell Herkimer's stamped cigarette inventory to licensed agents, wholesale dealers or retailers in the State. Petitioners believe that the inventory was sold for an amount substantially less than the actual value of the inventory. The Division did not obtain payment for the stamps from Marine Midland. The Division's claim against Herkimer and petitioners was not reduced by the value of the tax stamps affixed to the inventory that Marine Midland repossessed and sold.

12. The Division denied the following allegations from paragraph 18 of petitioner's brief.

(a) The Division authorized Marine Midland to return unaffixed tax stamps and agreed to pay a refund of the value of the tax stamps to Marine Midland upon receipt of a refund claim.

(b) Subsequently, the Division approved and paid a refund claim submitted by Marine Midland.

(c) The amount of tax due from Herkimer was not reduced by the amount of the returned tax stamps.

13. On July 30, 1999, the petitioners served the Division with a Demand for a Bill of Particulars. In general, the demands are verbose and repetitive, and some of the demands simply refuse to give up their meaning without a struggle. Take the following example:

State whether it is the Division's contention that none of the cigarette packages purchased by the corporation that were sold or transferred by the corporation's secured creditor to which stamps were affixed were returned to the manufacturers of the cigarettes for destruction by the secured creditor's transferee as unsalable, stale or otherwise unfit for use or consumption or, if such packages of cigarettes were returned to the manufacturers of the cigarettes by the secured creditor's transferee for destruction, that any of the manufacturers reimbursed the secured creditor's transferee for any portion of the cigarette tax or sales tax represented by the face value of the stamps affixed to the packages of cigarettes that were returned.

14. I have attempted to briefly summarize the demands. My summary is as follows:

(a) Numbers 1(a), 1(b), 1(c), 1(d) and 1(e) of the demand essentially make two requests.

They ask the Division to state the basis for its statement that liability for the prepaid sales tax arose at the time the stamps were transferred to Herkimer rather than at the time payment for the stamps was due; in addition, they ask the Division to state the basis for its position that petitioners were liable for payment of the prepaid sales tax even after Marine Midland took control of the corporation. In addition, petitioners ask the Division to provide a copy of "any rule, regulation, ruling, interpretation, decision, opinion, order or pleading that supports or tends to support the Division's contentions with respect to each of the matters stated by the Division [in response to the demands]."

(b) Numbers 2(a), 2(b), 2(c), 2(d), 2(e), 2(f), 2(g), 2(h), 2(i), 2(j), 2(k), 2(l) of the demand ask the Division to expand on its statement that any “offset that results from stamps being transferred by the secured creditor . . . to another cigarette agent is a dispute between the corporation and the secured creditor.” Number 2(a) asks the Division to state whether it authorized Marine Midland to sell the cigarettes repossessed from Herkimer. Number 2(b) asks the Division whether it believes that tax stamps were affixed to all of the cigarette packages repossessed by Marine Midland. Number 2(j) asks whether it is the Division’s contention that it had no authority to collect the prepaid sales tax from Marine Midland on cigarettes packs transferred to Marine Midland with tax stamps affixed. Some of the demands ask the Division to detail its position on the debtor-creditor relationship between Herkimer and Marine Midland with regard to the tax stamps (2[c], 2[d], 2[e]). Numbers 2(f), 2(g), 2(h) and 2(i) appear to be based on hypothetical possibilities (e.g., that the cigarettes were returned to the manufacturers who then sought refunds of tax) not grounded in facts pleaded by either party. Numbers 2(k) and 2(l) ask the Division to provide copies of any writings that support its position.

(c) Numbers 3(a), 3(b), 3(c), 3(d), 3(e), 3(f), 3(g), 3(h), 3(i), 3(j), 3(k) and 3(l) relate to two parts of the Division’s answer: (1) its denial of petitioners’ allegation that the Division granted a refund of prepaid sales tax to Marine Midland for the value of unaffixed tax stamps returned to the Division and (2) the Division’s affirmative statement that a refund was time-barred because the stamps were more than two years old. Like the other demands, these demands are lengthy and confusing. Number 3(l) seeks copies of rules, regulations and statutes supporting the Division’s position.

15. The Division served its Bill of Particulars on or about August 5, 1999. In paragraph 1, the Division stated that it “[d]eclines to answer each and every demand contained in Petitioner’s

Demand for Bill of Particulars.” Paragraph 1 of the Division’s Bill of Particulars consists of a quotation from New York Practice (Siegel, 2d edition, 1991, § 238, pp. 356-357), which states among other things (1) that a party is required to particularize only those matters on which they have the burden of proof and (2) that the bill may not be used to obtain evidence. The remaining paragraphs of the Division’s bill are as follows:

2. Demand # 1. It is the Petitioners’ burden to prove that the actions of the secured creditor prevented them from exercising their authority as corporate officers to act on behalf of the corporation. It is furthermore Petitioners’ burden to demonstrate why liability for the taxes at issue (as opposed to when payment is due) does not arise at the time the corporation took possession of the stamps.

3. Demand # 2. The Division declines to answer this demand as it is a) an improper attempt at discovery and b) a defectively drafted Notice to Admit.

4. Demand # 3. The Division declines to answer this demand as it is a) an improper attempt at discovery and b) a defectively drafted Notice to Admit.

16. After receipt of the Division’s Bill of Particulars, petitioners filed the instant motion for an order of preclusion or for a further bill of particulars. The Division filed an affidavit in opposition to petitioner’s motion on September 22, 1999, including with its affidavit numerous documents that had been provided to petitioners with the Division’s original bill.¹

17. The Division’s affidavit consists of 13 separately numbered paragraphs, none of which directly responds to petitioners’ demands. Enclosed with the affidavit were various documents previously supplied to petitioners’ representative as well as copies of letters exchanged by the parties. Paragraph 7 of the affidavit directs attention to a document which shows the number of stamps seized by Marine Midland and the disposition of the stamps,

¹ The Division mailed two letters to petitioners’ representative, dated September 8, 1999 and September 9, 1999 respectively, copies of these letters were also sent to Daniel J. Ranalli, Assistant Chief Administrative Law Judge. By letter dated September 13, 1999, Mr. Jackson argued that the letters are not a substitute for a bill of particulars and requested that petitioners’ motion be considered and decided in its entirety. Because I agree with petitioners that the letters are not a satisfactory response to a demand for a bill of particulars, the contents of those letters will not be considered here, although they were attached to the Division’s reply to petitioners’ motion.

apparently as reported to the Division by Marine Midland. Also among the documents submitted were letters exchanged between the law firm representing Marine Midland and Peter Spitzer, Excise Tax Auditor II in the Division's Bond and Registration Unit. It is apparent from a review of these letters that petitioners' demand for a bill of particulars addresses factual issues raised by these letters.

18. In addition to providing documentation, the Division affirmatively states that Herkimer was liable for the value of tax stamps attached to cigarette packages at the time that the stamps came into Herkimer's possession and that the liability for the stamps remained with Herkimer even after the cigarette packs were repossessed by Marine Midland and sold to another dealer. The Division cites to *Matter of Leonard Schwartz d/b/a Globe Wholesale Co.* (Tax Appeals Tribunal, July 6, 1995) to support this proposition, and the Division asserts that it is petitioners' burden of proof to show that the actions by Marine Midland extinguish the Herkimer's liability for the tax and the liability of petitioners as officers of Herkimer. The Division also states that the burden is on petitioners to establish that petitioners lost control of the corporation as of November 7, 1997 because of actions by Marine Midland. The Division directs petitioner to *Matter of Jack Schwartz* (Tax Appeals Tribunal, August 19, 1999) for the appropriate legal standard to be applied.

19. Based on the affidavit, letters to petitioners and documents provided, the Division asserts that it has "adequately apprised petitioners of its position regarding the two issues raised in the petition and has given notice of what facts need to be established at the hearing and what legal theory is applicable."

CONCLUSIONS OF LAW

A. The Rules of Practice and Procedure of the Tax Appeals Tribunal provide that a party may serve a demand for a bill of particulars upon an adverse party in order “to prevent surprise at the hearing and to limit the scope of proof” (20 NYCRR 3000.6[a][1]). The Rules permit a party to “serve written notice on the adverse party demanding a bill of particulars within 30 days of the date on which the last pleading was served” (*id.*). A party unwilling to give such particulars may move to vacate or modify the demand within 20 days after receipt of the demand (20 NYCRR 3000.6[a][2]). “If no such motion is made, the bill of particulars shall be served within 30 days after the demand, unless the administrative law judge designated by the tribunal shall direct otherwise” (20 NYCRR 3000.6[a][2]). If a party fails to furnish the bill of particulars, the party may, upon notice, be precluded by the Administrative Law Judge from giving evidence at the hearing “of items of which particulars have not been delivered” (20 NYCRR 3000.6[a][3]).

B. The bill of particulars is related to the burden of proof, and generally a party need particularize only as to those issues on which it has the burden of proof (*Holland v. St. Paul Fire & Marine Ins. Co.*, 101 AD2d 625, 475 NYS2d 156, 157). However, exceptions to this rule are warranted where necessary to further the purpose of the Division of Tax Appeals which is to provide the public with “a just system of resolving controversies with [the Division] and to ensure that the elements of due process are present with regard to such resolution of controversies.” (Tax Law § 2000.) To provide the parties with a fair and orderly system for resolving disputes, the Tax Appeals Tribunal has promulgated the rules of practice and procedure (20 NYCRR 3000.0) which require both parties to file pleadings which give “fair notice of the matters in controversy and the basis for the parties’ respective positions” (20

NYCRR 3000.4). Moreover, a petitioner may seek amplification of the Division's answer by serving a demand for a bill of particulars (20 NYCRR 3000.6[a][1]).

As the Division has consistently noted, at the hearing in this matter the burden of proof will be on petitioners to show that the Division's assessment is incorrect (*see, Finserv Computer Corp. v. Tully*, 94 AD2d 197, 463 NYS2d 923, *affd* 61 NY2d 947, 475 NYS2d 279). The Tax Appeals Tribunal has repeatedly affirmed that a presumption of correctness attaches to a properly issued notice of determination and that the burden is on petitioner to overcome that presumption of correctness (*see, e.g., Matter of Atlantic & Hudson*, Tax Appeals Tribunal, January 30, 1992). However, the assignment of the burden of proof does not relieve the Division of any obligation to respond to petitioners' legitimate inquiries regarding the basis for the assessment, and a failure to do so may result in cancellation of the notice (*see, Matter of Basileo*, Tax Appeals Tribunal, May 9, 1991; *Matter of Fokos Lounge*, Tax Appeals Tribunal, March 7, 1991; *Matter of Shop Rite Wines & Liqs.*, Tax Appeals Tribunal, February 22, 1991; *Matter of Fashana*, Tax Appeals Tribunal, September 21, 1989). Where, as here, the Division's answer fails to provide "fair notice of the matters in controversy and the basis for [its] position" (20 NYCRR 3000.4[a]), i.e., the basis for the statutory notice, the petitioner may file a demand for a bill of particulars to seek amplification of the answer. The Division is then obliged to respond to the demand within the framework of the Rules of Practice and Procedure of the Tax Appeals Tribunal.

In response to a demand for a bill of particulars, a bill should follow the designation of the items set forth in the demand, answering each item separately or separately stating the reason why a particular cannot be furnished. If a party is unwilling to give particulars, it should file a motion to vacate or modify the demand. The Division has not furnished a bill which satisfies

these requirements. The letters and documents provided to petitioners, whether in connection with their demand or in an attempt to resolve the matter, are not satisfactory substitutes for a bill.

C. The Division is directed to furnish petitioner with a bill responding to items 1(a) through 1(e) of the demand.

Item 2 of the demand requests particulars regarding the Division's statement that "[a]ny offset that results from stamps being transferred by the secured creditor . . . to another cigarette agent is a dispute between the corporation and the secured creditor." Those demands which request that the Division detail its position on the relationship between Herkimer and Marine Midland with respect to the tax stamps (2[c], 2[d], 2[e]) and those demands which appear to be based on hypothetical possibilities (2[f], 2[g], 2[h], [i]) go beyond the affirmative statements made by the Division in its answer, and those demands are vacated. Number 2(a) of the demand asks the Division whether it authorized Marine Midland to sell cigarettes repossessed from Herkimer. The Division admitted that it did provide such authorization by admitting allegations made in paragraphs 16 and 17 of the petition. The Division is directed to furnish a bill responding to items 2(b) and 2(j).

The Division furnished petitioners with information regarding the unaffixed stamps which were returned to the Division and has agreed to reduce the assessment by the value of the returned stamps. It would appear that this concession renders moot the demands made in number 3 of petitioners' demand for a bill of particulars; therefore, number 3 of the demand is vacated.

D. Petitioners' motion for preclusion or for a further bill is granted to the extent indicated in Conclusion of Law "C" and is denied in all other respects. The Division is directed to furnish a further bill as indicated in Conclusion of Law "C" by November 1, 1999.

DATED: Troy, New York
October 14, 1999

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE